

Global Warming In Court

UTILITIES WIN FIRST ROUND

By Lisa M. Jaeger

JUST ONE MONTH after hearing oral arguments in a closely watched global warming case against five utilities, Judge Loretta A. Preska of the U.S. District Court for the Southern District of New York in mid-September dismissed the case brought by eight states and environmental groups. In *CT v. AEP*, California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont and Wisconsin and environmental plaintiffs alleged that the five named utilities (AEP, Southern, TVA, Xcel and Cinergy), contributed to global warming by emitting CO₂, and caused a public nuisance affecting 77 million citizens of those states. Plaintiffs asked the court to order the utilities to cap and reduce their CO₂ emissions.

The case is one of the first forays into the judicial forum on global warming claims by environmentalists and allied attorneys general. The court's opinion is crisp and categorical, arrived early in the judicial debate, and is out of the Southern District of New York — a court watched closely in political circles. These features will ensure the decision's prominence in the debate. Utility defendants can be glad about that.

The court rested its opinion on the Constitution and deemed global warming a political matter, not one for the courts. Judge Preska opened her opinion strongly, citing the Federalist Papers and the Constitution: "The Framers based our Constitution on the idea that a separation of powers enables a system of checks and balances..."

She went on to conclude that the case presented political questions "consigned to the political branches that are accountable to the people, not to the judiciary, and the judiciary is without power to resolve them."

The court reviewed the long history of congressional and executive branch actions on the issue and concluded that complex policy decisions "must be made by the elected branches before a non-elected court can properly adjudicate a global warming nuisance claim."

By deciding the judicial branch has no role in the matter, the court's reasoning could apply to similar cases brought in other courts. The adoption of this reasoning by other courts would address one of most troubling aspects of the case for utilities: spin-off lawsuits. The interstate nature of the electric power industry, combined with the global nature of CO₂ in the atmosphere, create the real possibility that similar nuisance claims could be brought by any plaintiff anywhere against any utility in any court. In fact, building on a trial lawyer strategy, the island

nation of Tuvalu has already organized to file a lawsuit claiming that CO₂ emissions have caused the sea level to rise and threaten the island's existence.

While the court's analysis is potentially far reaching, equally important is what the court did not say. By resting its decision on the political nature of the case, the court sidestepped other more cumbersome, less conclusive bases for a decision.

For example, the utilities had argued that plaintiffs lacked "standing" to be before the court because they had alleged no injury that could be redressed by the court. Under standing doctrine, a court will dismiss a case as not properly before it if the plaintiff has not shown that defendants caused an injury that can be remedied by some action within the court's authority to order. Here, the utilities argued that plaintiffs' claim of harm from CO₂ emissions was speculative, could not be traced to the utility emitters (from among all emitters worldwide), and could not be remedied by a court order capping and reducing the utilities' CO₂ emissions.

The court declined to decide the case on that basis, but noted that whether plaintiffs have standing is not easily resolved and would turn on many of the same political questions that are beyond the court's constitutional authority to address. Of course, the court also declined to endorse the plaintiffs' view of standing.

Standing to bring global warming challenges is a critical threshold issue for environmentalists and activist states, which they need to overcome in order to pursue their present strategy of using the courts to press for mandatory CO₂ emission reductions.

This issue was pivotal in another unrelated global warming case recently decided by the U.S. Court of Appeals for the District of Columbia Circuit. In that case, the court's decision was adverse to environmentalists and did not resolve the standing question.

At least for now, utilities can be encouraged by the precision of the Southern District court's opinion, which could make it difficult for the appellate court to overturn. For their part, plaintiffs will not be deterred by this one adverse district court opinion and have already filed their appeal to the 2nd U.S. Circuit Court of Appeals. They also continue to test-market global warming cases in a variety of courts and contexts, which present some of the same issues before the court in *CT v. AEP*. Presently, utilities and other CO₂ emission sources appear to have a slight edge in the courts, but that could change.



Lisa M. Jaeger, an attorney with Bracewell & Giuliani LLP, Washington, D.C., contributed to the brief in the greenhouse gas lawsuit that was filed by Unions for Jobs and the Environment, an association of 10 national and international unions.

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The Oregon Public Utilities Commission has renewed Northwest Natural Gas's conservation tariff.

"The tariff breaks the link between the company's earnings and the quantity of energy consumed by its customers, so the company does not have an incentive to discourage conservation efforts," the utility wrote in a press release.